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A PRE-HISTORY OF THE AMERICANS WITH DISABILITIES ACT AND SOME INITIAL THOUGHTS AS TO ITS CONSTITUTIONAL IMPLICATIONS

ROBERT E. RAINS*

I. INTRODUCTION

On July 26, 1990, President Bush signed into law the Americans With Disabilities Act of 1990 (the A.D.A.).¹ This landmark legislation has been hailed as the "Emancipation Proclamation for those with disabilities."² Its broad provisions address employment, public services, public transportation, public accommodations, and telecommunications in elaborate and technical detail, with over fifty pages in the Statutes at Large, and a multitude of effective dates.³ Its strong provisions prohibiting employment discrimination against persons with disabilities will apply to employers with twenty-five or more employees as of July 1992, and to those with fifteen or more employees as of July 1994.⁴ There are provisions for enforcement by the Equal Employment Opportunity Commission, by the U.S. Attorney General and by persons alleging discrimination.⁵ Invoking its constitutional powers,⁶ Congress has declared that states are not immune under the eleventh amendment in any action for violation of the A.D.A.⁷ Congress has further provided

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1. Pub. L. No.101-336, 104 Stat. 327 (1990), 42 U.S.C.A. § 12101-12213 (West 1991).

2. Harkin, *Our Newest Civil Rights Law*, TRIAL 56 (Dec. 1990); Ludwig, and Turner, *New Promises to Keep*, THE PA. LAW. 15-16 (Jan. 1991). In somewhat more restrained language, the A.D.A. has also been called "a new bill of rights for the disabled." Brandfield, *Undue Hardship: Title I of the Americans With Disabilities Act*, 59 FORDHAM L. REV. 116-7 (1990).

3. For a concise explanation of the effective dates see Parry, *The Americans With Disabilities Act, Effective Dates In Each Title*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 13 (Jan.-Feb. 1991).

4. Americans with Disabilities Act § 101(5)(A), 42 U.S.C.A. § 12111(5)(A) (West 1991).

5. *Id.* at § 107(a), 42 U.S.C.A. § 12117(a).

6. *Id.* at § 2(b)(4), 42 U.S.C.A. § 12101(b)(4).

7. *Id.* at § 502, 42 U.S.C.A. § 12202.

for the award of attorneys' fees to the prevailing party⁸ even if the defendant is the United States.⁹

One cannot fully appreciate the remarkable achievement the A.D.A. constitutes without understanding the history of prior attempts (or the lack thereof) to bring individuals with disabilities under the protection of federal antidiscrimination laws. This Article will take a brief look at the politics of the Civil Rights Act of 1964,¹⁰ which failed to address handicap discrimination. It will then explore the passage of the Rehabilitation Act of 1973¹¹ and its subsequent mixed (at best) reception in the Supreme Court. Finally it will raise a question and suggest an analysis as to the constitutional implications of the A.D.A.

II. A GLIMPSE AT THE POLITICS OF THE CIVIL RIGHTS ACT OF 1964

In 1964, America was mourning the assassination of its young President, and a new President from the Deep South became committed to the enactment of a new Civil Rights Act addressing the grievances of the black minority. The civil rights movement had been active for some period of time. There had been freedom rides,¹² riots and the intervention of federal troops at "Ole Miss,"¹³ murders of both black and white civil rights activists,¹⁴ the historic March on Washington,¹⁵ the bombing of Birmingham's Sixteenth St. Baptist Church¹⁶ and freedom riders martyred.¹⁷ The basics of the 1964 Civil Rights Act, now taken for granted in most quarters, were a hotly debated political issue.

8. *Id.* at § 505, 42 U.S.C.A. § 12205.

9. *Id.*

10. Pub. L. No.88-352, 78 Stat. 241 (1964).

11. Pub. L. No.93-112, 87 Stat. 355 (1973).

12. "The summer of freedom rides" occurred in 1961. T. BRANCH, *PARTING THE WATERS - AMERICA IN THE KING YEARS* 451-491 (1988).

13. Two deaths resulted from the rioting surrounding the efforts of James Meredith to register at the University of Mississippi in 1962. See M. VIORST, *FIRE IN THE STREETS* 215 (1979).

14. "On April 23, William L. Moore, a white postman from Baltimore, was shot dead on an Alabama highway while carrying a sign saying 'Equal Rights for All.' On June 12, Medgar Evers, field secretary of the Mississippi NAACP, was murdered by a sniper's bullet outside his home in Jackson." *Id.* at 222.

15. The March on Washington - at which Dr. Martin Luther King, Jr. delivered his famous "I Have a Dream" speech - occurred on August 28, 1963. L. FISHEL AND B. QUARLES, *THE NEGRO AMERICAN: A DOCUMENTARY HISTORY* 531-534 (1967).

16. Four young black girls were killed in this heinous crime less than three weeks after the March on Washington. See T. BRANCH, *supra* note 12, at 888-92.

17. Freedom riders Schwerner, Chaney and Goodman disappeared on June 21, 1964, shortly before passage of the 1964 Civil Rights Act. Their bodies were not discovered until August 4. See M. VIORST, *supra* note 13, at 258-9. Obviously the events described in this sentence of text are only meant to be reminders of a traumatic time in America's history; this is not intended to be even a brief overview of the civil rights movement.

Moreover, the South had voted Democratic consistently since Reconstruction,¹⁸ and the former President had only been elected in 1960 by the slimmest of majorities, dependent in the Electoral College on his victory in the South.¹⁹ Although the era of "Massive Resistance" was coming to an end,²⁰ there was very strong and entrenched resistance to enactment of the 1964 Civil Rights Bill, and its passage was far from assured. Indeed in the upcoming Presidential campaign in 1964, the vote against that bill by the nominee of one of the two major parties became a significant electoral issue.²¹

Against this background, one of the opponents of the enactment of the 1964 Civil Rights Bill, the extremely powerful chairman of the House Rules Committee, Howard "Judge" Smith, came up with what appeared to be a brilliant idea. He proposed an amendment to Title VII of the Civil Rights Bill, the employment provisions, which would be so divisive that if it were passed, it could scuttle the entire Civil Rights Bill. Therefore, to the horror of northern liberals, Judge Smith proposed the addition of the word "sex" into Title VII's list of impermissible bases for employment decisions. Immediately, a group of northern liberals, sympathetic to the Civil Rights Bill and fearful that this amendment would make it too controversial, took the floor of the House to speak against it. "With a coalition of southerners and women supporting it and the rest of the House hopelessly divided on the apparent choice between equal rights for blacks and equal rights for women, the Smith Amendment passed, 168-133."²²

18. N. PEIRCE, *THE PEOPLE'S PRESIDENT*, 93, 97, 176, 189, 216-17, 260, 270 (1968).

19. *Id.* at 20. Despite a very close victory in the popular vote, Kennedy won the Electoral College by a margin of 303 to 219, carrying Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. *THE WORLD ALMANAC AND BOOK OF FACTS* 1990, 309-333 (1990).

20. "Massive Resistance", a term championed by Virginia Senator Harry Byrd, was the political rallying cry for those who vowed to fight desegregation by such means as closing any white school that allowed black children to enroll. *See* J. PELTASON, *FIFTY-EIGHT LONELY MEN* 208-18 (1961); R. WOLTERS, *THE BURDEN OF BROWN — THIRTY YEARS OF SCHOOL DESEGREGATION* 65-127 (1984).

21. Although Pres. Johnson and Sen. Goldwater agreed not to make the latter's vote against the bill a campaign issue, Sen. Goldwater was publicly criticized as a racist, and he broke the agreement by publicly attacking the bill in the last week of the presidential campaign. B. GOLDWATER, *GOLDWATER* 193 (1988), T.H. WHITE, *THE MAKING OF THE PRESIDENT* 1964, 205, 319, 357 (1965). The importance of this issue is best seen in the remarkable reversal of regional voting patterns in 1964, with the Republicans carrying five states of the Deep South - Mississippi, Alabama, Louisiana, South Carolina and Georgia. *THE MAKING OF A PRESIDENT* 1964, at 400. In addition, Goldwater would have carried another four Southern states - Virginia, North Carolina, Tennessee, and Arkansas - but "for the phenomenal increase and spectacular shape of Negro voting." *Id.* at 401.

22. W. ESKRIDGE, JR. AND P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 12-17 (1988). This text provides a

Considering that northern liberals seeking to extend civil rights to blacks already opposed dilution and further politicization of their proposed legislation by the addition of employment protections for women, it is hardly surprising that there was simply no constituency in the Congress for incorporating any provisions into the 1964 Civil Rights Bill to protect individuals with handicaps. As we know, the Civil Rights Bill became law, but sadly contained no protections for individuals with disabilities.

Of course there was a great debate in Congress over its authority to enact the 1964 Civil Rights Act. Some legislators looked to the commerce clause, some to the enforcement power found in section 5 of the fourteenth amendment. Others believed that they could rely upon either or both.²³ After the 1964 Civil Rights Act was enacted, it was promptly challenged in cases that quickly came before the United States Supreme Court. In *Heart of Atlanta Motel v. United States*,²⁴ the Court upheld the public accommodations provisions in Title II on the basis of the commerce clause, and therefore did not reach the fourteenth amendment issue. In *Katzenbach v. McClung*,²⁵ the Court upheld application of the Title II provisions to a restaurant that was not frequented by interstate travelers where that restaurant received a substantial portion of its food through interstate commerce. Again the Court relied on the commerce clause and did not reach the fourteenth amendment issue.

III. THE REHABILITATION ACT OF 1973

In the early 1970s, Congress attempted, somewhat belatedly, to enact protections into federal law that would address handicap discrimination, albeit not in as broad a fashion as the 1964 Civil Rights Act addressed other forms of discrimination. This legislation was to have almost as difficult a process of enactment as the Civil Rights Act had. In 1972 Congress passed H.R. 8395, the "Rehabilitation Act of 1972."

fuller description of the legislative history of the Civil Rights Act of 1964, at 1-28. The author is indebted to this source for the history of Rep. Smith's ill-fated effort to torpedo the Civil Rights Bill. Lest anyone doubt Rep. Smith's true position on this legislation, one need only note his remarks on the date of its final enactment, July 2, 1964, when he referred to it as a "monstrous invasion of the civil and constitutional rights of all the 180 million people of this country. . ." and a "monstrous implement of oppression. . ." He warned that "[h]ordes of beatniks, misfits, and agitators from the North, with the admitted aid of the Communists, are streaming into the Southland on mischief bent, backed and defended by other hordes of Federal marshals, Federal agents and Federal power." Quoted in STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART II, 1420-21 (SCHWARTZ, 1970).

23. See STATUTORY HISTORY OF THE UNITED STATES, *supra* note 22, at 1089-1452, esp. 1186, 1198-1203; 1964 U.S. CODE CONG. AND ADMIN. NEWS, 2366-8.

24. 379 U.S. 241 (1964).

25. 379 U.S. 294 (1964), colloquially known as the "Ollie's Barbecue" case.

President Nixon pocket-vetoed that bill in October 1972, thereby leaving Congress with no opportunity to override the veto.²⁶

Undaunted by rejection of the 1972 bill, Congress passed a new version of the Rehabilitation Act, S.7, in 1973. President Nixon vetoed this version of the Rehabilitation Act,²⁷ and the Senate failed to override that veto.²⁸

Finally, Congress passed H.R. 8070, yet another version of the Rehabilitation Act, which was acceptable to President Nixon who signed it into law in September 1973.²⁹ Hence, almost a full decade after passage of the 1964 Civil Rights Act, there was finally some legislation at the federal level that extended some protection against discrimination to individuals with disabilities in some situations.

The Rehabilitation Act of 1973 clearly constituted an enormous step forward, at the federal level, for individuals with disabilities. Moreover, it acted as an impetus for many states to add provisions to their state antidiscrimination laws to provide protections for individuals with handicaps.³⁰ Nevertheless, there were and are many deficiencies in the Rehabilitation Act. These may be grouped into several categories.

The first deficiency in the Rehabilitation Act is its coverage. Whereas the 1964 Civil Rights Act, (as amended in 1972) extended its protections against discrimination on the basis of race, color, religion, sex, and national origin, alleged to be committed by employers with fifteen or more employees,³¹ the reach of the Rehabilitation Act

26. 28 CONG. Q. ALMANAC, 80-A - 81-A (1972).

27. SENATE DOCUMENTS, Vol. 1-1, No. 93-10 (1973).

28. 29 CONG. Q. ALMANAC, 560 (1973).

29. *Id.* at 557. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973). The antidiscrimination provisions are contained in Title V §§ 501, 503 and 504, 29 U.S.C. §§ 791, 793 and 794 (1982).

30. By 1986 forty-three states and the District of Columbia had statutes to protect handicapped people from private employment discrimination. Flacus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 CIN. L. REV. 109, n.189 (1986).

31. Subchapter VI - Equal Employment Opportunities, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1982) provides:

§ 2000e. Definitions

For the purposes of this subchapter-. . .

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Amendments of 1973 is far more limited. The Rehabilitation Act only prohibits handicap discrimination by federal executive agencies, federal grantees and federal contractors.³² Therefore, there is a very large universe of employers with fifteen or more employees who are prohibited from discriminating on the basis of race, color, religion, sex or national origin, but who can discriminate against handicapped individuals with impunity, having committed no violation of federal law.

The second major deficiency of the Rehabilitation Act of 1973 was in its enforcement provisions, or lack thereof. As originally enacted, section 504 of the Rehabilitation Act, dealing with discrimination by federal grantees, had no mechanisms for enforcement. Indeed, there were no regulations promulgated by the federal government until the government was sued. In *Cherry v. Mathews*,³³ the Secretary of Health, Education and Welfare (HEW) was ordered by the federal district court to promulgate such regulations. The Secretary filed an appeal.³⁴ It was not until May 1977, that HEW promulgated the first set of implementing regulations, and this occurred only after there was a wheelchair sit-in in the outer office of Secretary Califano.³⁵

A third problem with the Rehabilitation Act was with funding. When HEW finally promulgated the first set of regulations three and a half years after enactment of the Rehabilitation Act, it estimated that the regulations would cost approximately \$3.2 billion per year.³⁶ Congress appropriated nothing. This lack of funding created real hardships for federal grantees who would be caught in the "Catch 22" of either not complying with the regulations or using funds that had been obtained for other purposes in order to comply. This dilemma was best articulated by Federal District Judge Robert W. Hemphill. In *Barnes*

The provision extending coverage to employers with fifteen to twenty-four employees was added by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103.

32. Section 501 requires affirmative action in employment by federal executive agencies. 29 U.S.C. § 791 (1982). Section 503 likewise requires affirmative action in employment by federal contractors with contracts over \$2,500. 29 U.S.C. § 793 (1982). Section 504 requires nondiscrimination by federal executive agencies and federal grantees. 29 U.S.C. § 794 (1982).

33. 419 F. Supp. 922 (D.D.C. 1976).

34. The Secretary filed an appeal on January 19, 1977. After the Secretary promulgated the regulation, the Court of Appeals dismissed the action as moot. *Cherry v. Mathews*, D.D.C. No. 76-0255, docket entries on file at office of St. Louis Univ. Public Law Review.

35. 42 Fed. Reg., 22676 *et seq.* (May 4, 1977), applicable to grantees receiving funds from the Department of Health, Education and Welfare. For a description of the demonstrations, see Fraker and McGee, *Hire the Handicapped* NEWSWEEK, 39 May 9, 1977. See also 33 CONG. Q. ALMANAC, 483-4 (1977).

36. O'Neill, *Discrimination Against Handicapped Persons, The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance*, 64-5 (May 4, 1977). To obtain a copy of this work, see 42 Fed. Reg. 22,677 (May 4, 1977).

v. Converse College,³⁷ a hearing-impaired college student sought an interpreter while she attended a college that received federal funds. Judge Hemphill granted her request for a preliminary injunction, ordering the college to provide the interpreter. Doing so, he delivered some telling remarks. In his opinion he wrote:

Converse College has been in the vanguard of educational institutions in the region which have developed programs and facilities for the handicapped. It is ironic that its students and benefactors may now be forced by the federal government to shoulder a substantial financial burden to provide special services for any handicapped person who should choose to go to Converse College. This is not to say that this court is not entirely sympathetic with the spirit of federal legislation which encourages the expansion of opportunities for the handicapped. This is merely to say that if the federal government, in all its wisdom, decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money (i.e. our taxes) for such purposes and not require that private educational institutions use their limited funds for such purposes.³⁸

A related enforcement problem was, for many years, the lack of any clear articulation by the United States Supreme Court of whether a private right of action existed under the Act. The Supreme Court perhaps set a record for the number of times that it side-stepped this issue. In *New York City Transit Authority v. Beazer*,³⁹ the Court was faced with a challenge to the Transit Authority's denial of employment to persons receiving methadone maintenance treatment. The job applicants raised to the Supreme Court a 1978 amendment to the Rehabilitation Act which rather clearly included discrimination on the basis of drug and alcohol use as a potential basis for relief under the Act.⁴⁰ The Court refused to address the issue. It stated:

Even if respondents correctly interpret the amendment, and *even if they have a right to enforce that interpretation*, the case is not moot since their claims arose even before the Act itself was passed, and they have been awarded monetary relief. Moreover, the language of

37. 436 F. Supp. 635 (D.S.C. 1977).

38. *Id.* at 639.

39. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 580-581 (1979).

40. The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978), amended the definition section in Title V of the Rehabilitation Act, by adding the following, curiously negatively phrased language:

For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

the statute, even after its amendment, is not free from ambiguity, and no administrative or judicial opinions specifically considering the impact of the statute on methadone users have been called to our attention. Of greater importance it is perfectly clear that however we might construe the Rehabilitation Act, the concerns that prompted our grant of certiorari would still merit our attention. We therefore decline to give the statute its first judicial construction at this stage of the litigation.⁴¹

In a footnote, the majority pointed out that the Court had granted certiorari in the pending case of *Southeastern Community College v. Davis*⁴² in which it would address whether there exists a private right of action to enforce Section 504 of the Rehabilitation Act.⁴³

Although the Court did indeed decide *Southeastern Community College v. Davis* in 1979,⁴⁴ it managed to resolve the case on the merits without ever addressing the issue of whether the plaintiff, Ms. Davis, was authorized by the Rehabilitation Act to bring her private action in federal court. The Court noted:

In addition to challenging the construction of §504 by the Court of Appeals, Southeastern also contends that respondent cannot seek judicial relief for violations of that statute in view of the absence of any express private right of action. Respondent asserts that whether or not §504 provides a private action, she may maintain her suit under 42 U.S.C. § 1983. In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them.⁴⁵

In short, the Court managed to decide the merits of the case without deciding whether it had jurisdiction to hear the case, and did this despite its promise in *Beazer* that it would decide this issue in the *Davis* case.

Two years later, the Court had yet another opportunity to address the remedies available to a handicapped person alleging discrimination by a federal grantee. Again it failed to do so. In *Camenisch v. University of Texas*,⁴⁶ the Fifth Circuit Court of Appeals upheld the granting of a preliminary injunction by a district court directing the university, pursuant to section 504, to provide a sign language interpreter to a deaf graduate student. The circuit court specifically found that the Rehabilitation Act confers a private right of action to enforce section 504 through injunctive relief.⁴⁷ The University petitioned for a writ of cer-

41. *Beazer*, 440 U.S. at 580-1 (emphasis added).

42. 439 U.S. 1065 (1979).

43. *Beazer*, 440 U.S. at 580, n.17.

44. 442 U.S. 397 (1979).

45. *Id.* at 404-5 n.5 (citations omitted).

46. 616 F.2d 127 (5th Cir. 1980).

47. *Id.* at 130-31.

tiorari on the issue of the existence of a private right of action, as well as on the merits of the case.⁴⁸ The Supreme Court granted review of the questions presented.⁴⁹ After oral argument, the Court found that one issue that had been raised was moot, and that the remaining substantive issue had to be remanded for a trial on the merits. Despite the fact that such a trial on the merits would have been wholly unnecessary if Mr. Camenisch had had no private right of action, the Court again declined to determine that issue.⁵⁰

It was not until 1984, some eleven years after the enactment of section 504, that the Supreme Court finally decided that there is a private right of action to enforce it, and even then the Court did so in a rather off-handed fashion. In *Consolidated Rail Corporation v. Darrore*,⁵¹ the Court noted that Conrail had argued below and in its opening brief that section 504 does not create a private right of action for employment discrimination. Conrail abandoned this position in its reply brief, and therefore the Court found: "it is unnecessary to address the issue here beyond noting that the courts below relied on *Cannon v. University of Chicago*, 441 U.S. 677 (1979), in holding that such a private right exists under § 504."⁵² The Court went on to hold that a handicapped person may recover back pay for intentional employment discrimination in an action to enforce section 504 even if the employer "receives no federal aid the primary purpose of which is to promote employment."⁵³ The necessary implication of this holding, along with the footnote already mentioned, is that the Court finally found a private right of action to enforce section 504 of the Rehabilitation Act in federal court.⁵⁴

Handicapped persons were not as fortunate in obtaining judicial remedies under section 503 of the Rehabilitation Act — requiring affirmative action by federal contractors — as they ultimately were under section 504. Section 503 of the Rehabilitation Act provides for

48. 49 U.S.L.W. 3295 (Oct. 21, 1980).

49. 449 U.S. 950 (1980).

50. *University of Texas v. Camenisch*, 451 U.S. 390 (1981).

51. 465 U.S. 624 (1984).

52. *Id.* at 630, n.7.

53. *Id.* at 637.

54. It should be noted that many lower courts had already inferred such a private right of action to enforce section 504, although they did not do so with unanimity. See *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1981), *cert. denied*, 459 U.S. 909 (1982), *on remand*, 580 F.Supp. 562 (E.D. Mo. 1984); *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981); *NAACP v. Wilmington Medical Center*, 599 F.2d 1247 (3rd Cir. 1979); *but see Longoria v. Harris*, 554 F.Supp. 102 (S.D. Tex. 1982) — no private right of action for damages. It was not until 1978 that Congress amended the Rehabilitation Act to add section 505 providing for attorneys' fees for prevailing parties enforcing their rights under section 504. The Rehabilitation Comprehensive Service, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978), adding section 505, 29 U.S.C. § 794a (1982).

filing administrative complaints with the United States Department of Labor, Office of Federal Contract Compliance Programs (OFCCP).⁵⁵ Over the years the OFCCP has received, at best, mixed reviews from advocates for the handicapped as to the zeal with which it has investigated and attempted to rectify such discrimination complaints.⁵⁶ Sadly, in an unbroken series of decisions, each circuit court of appeals which addressed the subject found that handicapped persons have no private right of action to assert in federal court a violation of their rights under section 503 of the Rehabilitation Act.⁵⁷ Utilizing the four-part test enunciated by the Supreme Court in *Cort v. Ash*,⁵⁸ these courts found that section 503 does not create such a private right of action. Bizarrely, these courts did not even find that handicapped persons meet the first part of the "*Cort* test," that they be one of the class for whose special benefit the statute was enacted.⁵⁹ By 1982, this finding of no judicially enforceable rights under section 503 was so clear to the federal courts that the Third Circuit Court of Appeals took only two brief paragraphs to join the other circuits, doing so in a per curiam opinion.⁶⁰

55. 29 U.S.C. § 793(b); see also 41 C.F.R. part 60-741.

56. In 1987, a report of the staff of the House Education and Labor Committee asserted that the OFCCP was "completely ineffective" and enforcing "underhanded policies" with regard to section 503. 10 HANDICAPPED AM. REP., 107 (June 4, 1987). See also *Healy v. Bergmann*, 609 F. Supp. 1448, 1455-6 (D. Mass. 1985).

57. See, e.g., *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985); *Hodges v. Atchison, Topeka and Santa Fe Ry. Co.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984); *Painter v. Horne Bros., Inc.*, 710 F.2d 143 (4th Cir. 1983); *Davis v. Ohio Barge Line, Inc.*, 697 F.2d 549 (3d Cir. 1983); *Beam v. Sun Shipbuilding and Dry Dock Co.*, 679 F.2d 1077 (3d Cir. 1982); *Fisher v. Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 459 U.S. 881 (1982); *Davis v. United Airlines, Inc.*, 662 F.2d 120 (2d Cir. 1981), *cert. denied*, 456 U.S. 965 (1982); *Simon v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); *Hoopers v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979); *Sanders v. Washington Metropolitan Area Transit Authority*, 652 F. Supp. 765 (D.D.C. 1986), *aff'd*, 819 F.2d 1151 (D.C. Cir. 1987); *Patton v. Thompson*, 37 Fair Empl. Prac. Cas. (BNA) 1024 (M.D. Ala. 1983), *aff'd*, 742 F.2d 1465 (11th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985); *Ernst v. Indiana Bell Telephone Co.*, 30 Fair Empl. Prac. Cas. (BNA) 1248 (S.D. Ind. 1982), *aff'd*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

58. 422 U.S. 66, 78 (1975) (First, is the plaintiff "one of the class for whose especial benefit the statute was enacted." Second, is there any indication of either implicit or explicit legislative intent to create or deny a remedy? Third, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" Fourth, "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely on federal law?").

59. See, e.g., *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079-80 (5th Cir. 1980).

60. *Beam v. Sun Shipbuilding & Dry Dock Co.*, 679 F.2d 1077 (3d Cir. 1982).

Over the years, the Supreme Court issued a number of limiting decisions creating problems with enforcement and coverage of the Rehabilitation Act.⁶¹ Although the Court had finally recognized that private parties may bring actions in federal court to enforce their rights under section 504, the very next year the Court created an enormous exception. In *Atascadero v. Scanlon*,⁶² the Court held that a plaintiff may not bring an action under section 504 where the defendant is a state or a state agency. The Court found that such actions are proscribed by the eleventh amendment, and barred compensatory, injunctive and declaratory relief.⁶³ Fortunately, Congress effectively overturned this result the next year by enacting the Civil Rights Remedies Equalization Act.⁶⁴

In *Community Television of Southern California v. Gottfried*,⁶⁵ the Court found that a licensing agency has no duty to consider a licensee's alleged violation of section 504. The Court addressed a challenge by a group of deaf and hearing-impaired persons to the license renewals by the Federal Communications Commission (FCC) of one public television station and seven commercial stations. Plaintiffs asserted that the stations failed to serve the public interest and violated section 504 by failing to ascertain and meet their special needs. The court of appeals distinguished between commercial and public stations and ruled that commercial stations are not bound by section 504 because they do not receive federal funds, while public stations that receive federal funds are bound by section 504. Thus "the FCC is obligated to take account of a public broadcaster's legal duties under Section 504 in making its public interest determinations."⁶⁶ The Supreme Court reversed this directive to the FCC, finding that it had no obligation to enforce section 504. Rather, that obligation fell on the funding agency,

61. The author does not mean to suggest that the Supreme Court's decisions under the Rehabilitation Act have been uniformly antithetical to the rights of individuals with disabilities. In *Alexander v. Choate*, 469 U.S. 287 (1985), the Court assumed without deciding that section "504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." Nevertheless the Court held that Tennessee's proposed reduction of the number of annual days of inpatient hospital care covered by its state Medicaid program did not violate section 504. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Court found that persons afflicted with contagious diseases are handicapped individuals within the meaning of section 504. Nevertheless, reviewing the Court's section 504 jurisprudence over a decade and a half, one cannot help but be struck by its bleakness from the viewpoint of individuals with disabilities.

62. 473 U.S. 234 (1985).

63. *Id.*

64. Civil Rights Remedies Equalization Act, Pub. L. No. 99-506, 100 Stat. 1845, 42 U.S.C. § 2000d-7 (1982).

65. 459 U.S. 498 (1983).

66. 655 F.2d 297, 307 (D.C. Cir. 1981).

in this case the Department of Education.⁶⁷ Ironically, in a related case brought by the same group of plaintiffs, another court of appeals reversed a district court which had ordered the Department of Education to promulgate regulations directing its grantees (public television stations) to implement section 504 for hearing-impaired viewers. The Supreme Court denied certiorari in this litigation.⁶⁸ Therefore, not only had the Court denied plaintiffs the right to seek a remedy before the licensing agency, but it also denied them the opportunity to argue in the Court that the federal funding agency should be required to promulgate implementing regulations.

Similarly, in *United States Department of Transportation v. Paralyzed Veterans of America*,⁶⁹ the Court addressed a decision of the Court of Appeals for the District of Columbia Circuit which had held that commercial airlines must comply with section 504.⁷⁰ The circuit court based its decision on the fact that the United States provides financial assistance to airport operators through grants from a trust fund created by the Airport and Airway Development Act of 1970 and also operates a nationwide air traffic control system. Relying on its decision in *Grove City College v. Bell*,⁷¹ the Supreme Court gave a narrow interpretation to the meaning of being a federal grantee. The Court found that despite the massive benefits which the federal government provides to commercial airlines, they are not grantees and therefore not covered by the Rehabilitation Act.⁷² Congress effectively overturned this decision with enactment of the Air Carrier Access Act of 1986.⁷³

In yet another restrictive decision the Court addressed whether a federal agency may treat alcoholism as "willful misconduct" for the purpose of denying access to benefits.⁷⁴ Honorably discharged veterans are entitled to receive educational assistance benefits under the "G.I. Bill" to facilitate their readjustment to civilian life.⁷⁵ Those benefits

67. 459 U.S. at 509. The Court did state that if a licensee was found "guilty" of violating the Rehabilitation Act, or any other federal statute, the FCC "would certainly be obligated to consider the possible relevance of such a violation in determining whether or not to renew the lawbreaker's license." *Id.* at 510.

68. *Greater Los Angeles Council on Deafness v. Comm. Television of Southern California*, 719 F.2d 1017, 1021, 1022 (9th Cir. 1983) *cert. denied*, 467 U.S. 1252 (1984).

69. 477 U.S. 597 (1986).

70. *Paralyzed Veterans of America v. CAB*, 752 F.2d 694 (D.C. Cir. 1985).

71. 465 U.S. 555 (1984).

72. 477 U.S. at 611-12.

73. Pub. L. No. 99-435, 100 Stat. 1080, 49 U.S.C. App. § 1374(c) (1986). It should also be noted that subsequently Congress more broadly overturned the *Grove City College* case by enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). The Civil Rights Restoration Act of 1987 is applicable to section 504 of the Rehabilitation Act. 29 U.S.C. § 794(b).

74. *Traynor v. Turnage*, 485 U.S. 535 (1988).

75. 38 U.S.C. § 1651 *et. seq.*

generally must be used within ten years of discharge or release from the service. However, the statute allows the ten year period to be extended if a veteran is prevented from using the benefits by "a physical or mental disability which was not a result of . . . [his] own willful misconduct."⁷⁶ The Veterans' Administration (VA) construed this statutory extension so as not to protect veterans who failed to use the G.I. Bill because of "primary" alcoholism.⁷⁷ Two veterans, recovered alcoholics whose alcoholism prevented them from using their G.I. Bill benefits within ten years, challenged the VA's interpretation as violative of section 504. Without deciding "whether alcoholism is a disease whose course its victims cannot control," the Court ruled that the VA could so discriminate against alcoholic veterans.⁷⁸ Again, Congress felt compelled to reverse the result. Within several months, it enacted the Veterans' Benefits and Programs Improvement Act of 1988 specifically providing that:

For the purpose of any provision relating to the extension of a delimiting period under any education benefit or rehabilitation program administered by the Veterans' Administration, the disabling effects of chronic alcoholism shall not be considered to be the result of willful misconduct.⁷⁹

76. 485 U.S. at 538.

77. The footnote reads:

The applicable regulation, 38 C.F.R. § 3.301(c)(2) (1987) provide(d): Alcoholism: The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately [sic] and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. This regulation was intended by the Veterans' Administration to incorporate the principles of a 1964 administrative decision. 37 Fed. Reg. 20335, 20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation). The 1964 decision provided that alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder" would not be characterized as willful misconduct. Administrator's Decision, Veterans' Administration No. 988, Interpretation of the Term "Willful Misconduct" as Related to the Residuals of Chronic Alcoholism, Aug. 13, 1964, App. 142-143. The Veterans' Administration refers to this type of alcoholism as "secondary," and to alcoholism unrelated to an underlying psychiatric disorder as "primary." See, *ibid.*; Veterans' Administration Manual M21-1, change 149, subch. XI, § 50.32 (Dec. 23, 1979) (hereinafter VA Manual). Petitioners were found to have suffered from primary alcoholism.

Id. at 538, n.2.

78. *Id.* at 552.

79. Pub. L. No. 100-689, 102 Stat. 4170, Section 109, 38 U.S.C. § 105(c).

IV. A CONSTITUTIONAL DISCUSSION

As already noted, one of the major deficiencies with the Rehabilitation Act is that it only applies to the federal government, federal grantees and federal contractors, in certain situations. Therefore, when a Texas city denied a special use permit for the operation of a group home for the mentally retarded pursuant to a municipal zoning ordinance, the program that wanted to operate the group home had no remedy under the Rehabilitation Act.⁸⁰ Instead, the Cleburne Living Center brought suit against the City of Cleburne alleging violation of the Equal Protection Clause of the fourteenth amendment. When that case reached the Fifth Circuit Court of Appeals, that court determined that mental retardation is a "quasi-suspect classification." Therefore, the court assessed the validity of the ordinance under "intermediate-level scrutiny" and struck down the ordinance.⁸¹ The Supreme Court granted certiorari.⁸²

In *City of Cleburne v. Cleburne Living Center, Inc.*,⁸³ on the ultimate question of whether the zoning ordinance violated the equal protection rights of mentally retarded persons as applied to them, the Supreme Court upheld the Fifth Circuit.⁸⁴ Significantly, however, in reaching that decision, the Court rejected the Fifth Circuit's decision that mentally retarded persons constitute a quasi-suspect classification. The Court based this decision on a number of reasons. First, it found that mentally retarded persons are a large and diversified group, and therefore, how they are to be treated is a difficult and technical matter that goes beyond "substantive judgments about legislative decisions."⁸⁵ Second, the Court reasoned that mentally retarded persons do not deserve the status of a quasi-suspect classification since they have been the beneficiary of a number of state and federal laws addressing their difficulties "in a matter that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."⁸⁶ The Court next reasoned that "[t]he legislative response, which

80. *Cleburne Living Center v. City of Cleburne, Texas*, 726 F.2d 191 (5th Cir. 1984).

81. *Id.* at 198.

82. 469 U.S. 1016 (1984).

83. 473 U.S. 432 (1985).

84. *Id.* at 450.

85. *Id.* at 442-3. The author is not persuaded by this reasoning. Surely racial minorities, who are considered to be suspect classifications, have various and disparate problems and are not all cut from the same mold. Nevertheless, in a series of decisions the Court has addressed discrimination on the basis of race using the most heightened level of judicial scrutiny reserved for suspect classifications. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Palmore v. Sidoti*, 466 U.S. 429 (1984).

86. 473 U.S. at 443. Again, this author is not persuaded. Surely the Civil Rights Act of 1964 was primarily addressed to discrimination against black Americans. The Voting Rights Act of 1965 and its later amendments addressed similar concerns. In

could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."⁸⁷ Finally, the Court opined that:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect. . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.⁸⁸

Thus, while the Court struck down this particular case of discrimination against this particular group of handicapped persons, it nevertheless managed to weaken future equal protection claims asserted by, not only mentally retarded persons, but other individuals with disabilities.

V. THE AMERICANS WITH DISABILITIES ACT OF 1990 - A CONSTITUTIONAL CONUNDRUM

Given the inherent deficiencies of the Rehabilitation Act, exacerbated by numerous restrictive interpretations by the Supreme Court, it is not surprising that Congress chose to revisit this area and enact broad remedial legislation, the Americans With Disabilities Act of 1990. Congress set forth in the A.D.A. a series of findings to justify the legislation. Congress found that, "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older. . ."⁸⁹ Congress found that these individuals with disabilities have been subject to serious forms of discrimination and "have often had no legal recourse to redress such discrimination."⁹⁰ It found that they are "severely disadvantaged socially, vocationally, economically and educationally."⁹¹ Significantly, Congress then made the following finding:

addition, there have been a variety of minority set-aside and affirmative action programs. *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448 (1980); Metro Broadcasting, Inc. v. Federal Communications Commission, _____ U.S. _____ 110 S. Ct. 2997 (1990). Nevertheless, the Court properly continues to view discrimination on the basis of race as suspect.

87. 473 U.S. at 445. Again, one only has to substitute the phrase "racial minorities" for "the mentally retarded" to realize the shallowness of the majority's reasoning.

88. *Id.* This is a floodgates argument rather than reasoned decision making. The Court feared deeming mentally retarded persons a quasi-suspect classification because there might be other equally deserving groups which could, under the Court's previous rationales, be justified in being treated similarly.

89. A.D.A., *supra* note 1, at Sec. 2(a)(1), 42 U.S.C.A. § 12101(a)(1) (West, 1991).

90. *Id.* at Sec. 2(a)(4), 42 U.S.C.A. § 12101(a)(4).

91. *Id.* at Sec. 2(a)(6), 42 U.S.C.A. § 12101(a)(6).

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . .⁹²

As a result, Congress invoked "the sweep of Congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities."⁹³

Much has been written about the Americans with Disabilities Act⁹⁴ and the regulatory process to implement the A.D.A. is underway,⁹⁵ but not without criticism.⁹⁶ This author will leave it to others to address in detail the various provisions of the Act and how they are being, or should be, enforced. There is, however, a constitutional issue which bears some consideration. The issue underlies how the courts should view future alleged acts of discrimination against persons with disabilities by states or state actors, particularly where such acts are *not* covered by the A.D.A. By what standard should the courts now scrutinize allegations of discrimination against individuals on the basis of disability asserted under the equal protection clause?

The legislative finding in the A.D.A. quoted above is a very close paraphrase of perhaps the most famous footnote in American constitutional law, footnote 4 in *United States v. Carolene Products Com-*

92. *Id.* at Sec. 2(a)(7), 42 U.S.C.A. § 12101(a)(7).

93. *Id.* at Sec. 2(b)(4), 42 U.S.C.A. § 12101(b)(4).

94. See, e.g., *The Americans with Disabilities Act Symposium, a View from the Inside*, 64 TEMPLE L. REV. 371 (1991). See also THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT AND COMPLIANCE (BNA 1990); Blandfield, *Undue Hardship: Title I of the Americans With Disabilities Act*, 59 FORDHAM L. REV. 113 (1990); Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 THE LABOR LAWYER 11 (1991); Gardner and Campanella, *The Undue Hardship Defense to the Reasonable Accommodation Requirement of the Americans with Disabilities Act of 1990*, *id.* at 37; Henderson, *Addiction as Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713 (1991); Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 THE LABOR LAWYER 1 (1991); Morin, *Americans With Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189 (1990); Weirich, *Reasonable Accommodation Under The Americans With Disabilities Act*, 7 THE LABOR LAWYER 27 (1991).

95. 56 Fed. Reg. 35408-35756 (July 26, 1991).

96. "Rules on hiring disabled called paternalistic," (AP), *The Sentinel*, July 23, 1991, at A3; "Disability regs confuse employers," (AP), *The Sentinel*, July 27, 1991, at B8; *Disability Act Regs Draw Mixed Reactions*, THE NAT'L. L. J. 10 (August 12, 1991); *New Disabilities Act Regulations May Pose Problems for Industry*, 14 THE NAT'L. L. J. 17 (August 26, 1991).

pany.⁹⁷ In this footnote, the Court attempted to articulate in a coherent fashion the basis for heightened judicial scrutiny in certain areas of constitutional adjudication. The Court found:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the fourteenth . . .

Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious. . . or national. . . or racial minorities. . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which call for a correspondingly more searching judicial inquiry. . . .⁹⁸

There can be little question that in adopting its finding in the A.D.A., Congress was attempting to utilize the *Carolene Products* formulation to mandate a heightened level of judicial scrutiny in cases of discrimination on the basis of disability.

This presents the nice constitutional question: Can Congress by statute create a quasi-suspect, or even a suspect, classification where the Supreme Court has previously held that a sub-group of that classification is not quasi-suspect? In other words, where the Supreme Court has previously held that one sub-group of Americans with disabilities, individuals with mental retardation, do not constitute even a quasi-suspect class,⁹⁹ can Congress statutorily mandate that not only individuals with mental retardation, but all other individuals with disabilities, be treated as a quasi-suspect or suspect class?

This is a question that will be debated by lawyers and scholars, but ultimately decided by the courts. A few preliminary thoughts are offered here. In addressing this question, it is necessary to consider what has been denominated the "Ratchet Theory"¹⁰⁰ of equal protection analysis. Perhaps the best articulation of that theory can be found in *Katzenbach v. Morgan*.¹⁰¹ The background of *Morgan* is that some years earlier the Supreme Court unanimously rejected a black citizen's attack on North Carolina's literacy test as a qualification for voting in *Lassiter v. Northhampton County Board of Elections*.¹⁰² Subsequently, Congress enacted the Voting Rights Act of 1965 which suspended liter-

97. 304 U.S. 144, 152-3 (1938).

98. *Id.* (citations omitted).

99. See notes 85-88, *supra*, and accompanying text.

100. See Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 606, 612 (1975).

101. 384 U.S. 641 (1966).

102. 360 U.S. 45 (1959).

acy tests in covered localities.¹⁰³ Certain registered voters in New York City had brought suit to challenge the constitutionality of one of the provisions of the Voting Rights Act insofar as it prohibited the enforcement of the election laws of New York requiring an ability to read and write English as a condition of voting. In *Morgan*, the Court noted its prior decision in *Lassiter*, but found that it was not dispositive. Rather, the Court articulated the question before it as follows:

Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?¹⁰⁴

The Court held that Congress does have such power. The Court found that Congress may, under section 5 of the fourteenth amendment, enact laws to increase equal protection guarantees, although Congress may not "restrict, abrogate, or dilute these guarantees."¹⁰⁵ The Court's rationale, that Congress can turn the equal protection ratchet only one way,¹⁰⁶ to increase equal protection rights, has been approved in subsequent opinions into the 1980's.¹⁰⁷

While the "Ratchet Theory" appears to remain good constitutional law, it has never been used by the Supreme Court to authorize Congress to create by statute a quasi-suspect or suspect classification. However, such authority would appear to be inherent in the Ratchet Theory. Whether or not the Supreme Court ultimately decides that Congress has now mandated heightened judicial scrutiny in cases of discrimination on the basis of disability brought under the fourteenth amendment, there can be no question that the A.D.A. will provide, when fully effective, powerful avenues of redress for Americans with disabilities who are subjected to discrimination.

103. Section 4(e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. § 1973(b) (1964 ed., Supp. I).

104. 384 U.S. at 649.

105. *Id.* at 651 n.10.

106. THE WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, DELUXE SECOND EDITION 1495 (1983) defines a ratchet as: "1. a hinged catch, or pawl, arranged so as to engage with a toothed wheel or bar whose teeth slope in one direction, thus imparting forward movement and preventing backward movement."

107. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982); *Oregon v. Mitchell*, 400 U.S. 112, 118, 248 (1970).